

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of November, two thousand and seven.

PRESENT: HON. WILFRED FEINBERG,
HON. SONIA SOTOMAYOR,
HON. BARRINGTON D. PARKER, JR.,

Circuit Judges.

United States of America,

Appellee,

-V.-

Nos. 05-7001-cr (L)
06-3228-cr (Con)

Mariluz Zavala, Jose Ibanez,

Defendant-Appellants.

For Appellant-Defendant
Mariluz Zavala:

DOUGLAS T. BURNS, Shaw Licitra Gulotta Esernio & Schwartz,
P.C., Garden City, New York.

For Appellant-Defendant
Jose Ibanez:

ALEXEI SCHACHT, Nalven & Schact, New York, New York.

For Appellee:

BONNIE KLAPPER, Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, and Susan Corkery, Assistant United States Attorney, *on the brief*), Brooklyn, New York.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED, that the judgments of conviction, insofar as they relate to defendants' sentences, are VACATED and REMANDED.

Defendant-appellants Mariluz Zavala ("Zavala") and Jose Ibanez ("Ibanez") appeal, respectively, from November 9, 2005 and April 6, 2006 judgments of the United States District Court for the Eastern District of New York (Feuerstein, J.).

Ibanez and Zavala, husband and wife, pled guilty for their roles in an alien smuggling scheme and were convicted of: (1) conspiracy to commit forced labor and document servitude in violation of 18 U.S.C. § 371; (2) conspiracy to harbor aliens within the United States in violation of 8 U.S.C. § 1324; (3) extortionate extension of credit in violation of 18 U.S.C. § 894(a)(1); and (4) possession of false alien registration cards in violation of 18 U.S.C. § 1028(a)(2). Their plea agreements contained an estimated advisory Sentencing Guideline range of 70-87 months imprisonment, based on a total offense level of 27 in Criminal History Category ("CHC") I. However, the Probation Sentencing Report, as amended by subsequent addenda, calculated the Guideline range as 108-135 months, based on a total offense level of 31 in CHC I. The difference in total offense levels between the plea agreements and amended PSR partly rested on a two-level role-in-offense enhancements under U.S.S.G. § 3B1.1(c).

At sentencing, the district court calculated Zavala's Guideline range as 168-210 months, based on a total offense level of 35 in CHC I. The difference in total offense level between the amended PSR and the district court's calculation stemmed from the district court's application of an additional four-level role-in-offense enhancement on Count One under U.S.S.G. § 3B1.1(a), for a total of six role-in-offense points for that count. The district court applied the same role-in-offense enhancement to Ibanez, who was sentenced approximately six months after Zavala. However, the district court calculated Ibanez's total offense level as 31—four points lower than Zavala's total offense level—after removing the vulnerable victims adjustment under Count One that it had applied to Zavala.¹ The resulting Guideline range for Ibanez, as calculated by the district court, was 108-35 months. Zavala was sentenced principally to 180 months imprisonment; Ibanez was sentenced principally to 135 months imprisonment.

¹ Zavala did not object before the district court to the application of the vulnerable victims enhancement, though Ibanez did. While the district court explained why it was removing the vulnerable victims enhancement for Ibanez, the court did not explain why the same downward adjustment should, or should not, have applied to Zavala. In a footnote in her brief on appeal, Zavala merely notes the discrepancy concerning the vulnerable victims enhancement, but does not argue that the district court erred in applying the vulnerable victims enhancement in connection with her sentence.

Defendants claim – and the government agrees – that the district court erred as a matter of law in applying the role-in-offense enhancements under U.S.S.G. § 3B1.1. Section 3B1.1 provides:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 3B1.1.

In this case, the district court applied simultaneous enhancements under subsections (a) and (c), for a total of six points. But we agree with the parties that it was error to do so. The most natural reading of § 3B1.1 is that its subsections are mutually exclusive as to any particular offense. That is, if subsection (a) does not apply, then subsection (b) might; and if neither (a) nor (b) applies, then (c) might. *United States v. Szur*, upon which the district court appears to have relied, is not to the contrary. 289 F.3d 200 (2d Cir. 2002). In *Szur*, we simply condoned the application of different role-in-offense enhancements for separate offenses; namely, a four-level subsection (a) enhancement based on the defendant's role in a fraud offense, and a two-level enhancement based on his part in a separately charged money laundering offense. *Id.* at 218-19. Here, by contrast, the district court erred by applying simultaneous role-in-offense enhancements under subsections (a) and (c) for the same offense.

Moreover, as the government notes, the district court failed to undertake a sufficient factual analysis to support its finding that the criminal activity “involved five or more participants or was otherwise extensive” for purposes of its enhancements under U.S.S.G. § 3B1.1(a). The only knowing participants in this case were the defendants and perhaps their daughter, who was a minor throughout much of the relevant time. The district court, thus, presumably deemed the criminal enterprise “otherwise extensive.” But as we explained in *United States v. Carrozzella*, a district court making this determination must first determine: “(i) the number of knowing participants; (ii) the number of unknowing participants whose activities were organized or led by the defendant[s] with specific criminal intent; [and] (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme.” 105 F.3d 796, 803-04 (2d Cir. 1997), *abrogated in part on other grounds by United States v. Kennedy*, 233 F.3d 157, 160-61 (2d Cir. 2000). This the district court failed to do. Rather, it simply stated at Zavala's sentencing that the organization was extensive. And at Ibanez's sentencing, the court, responding to defense counsel's objection to the subsection (a)

enhancement, merely questioned: “You mean the incorporation of the people who provided the jobs, provided the false documentation in several places, you don’t think that fits within the statute?” *Carrozzella* requires a more searching analysis. What may have been self-evident to the district court is not obvious to us from the record. We thus remand to allow the district court to make the requisite factual determinations under § 3B1.1 and to reassess which, if any, of its subsections should apply.²

Separately, Ibanez claims that the district court erred under U.S.S.G. § 3D1.2 by not grouping Count Four with the remaining counts to which he pled guilty. Specifically, he claims that grouping of all four offenses was warranted on the grounds that the “counts involve the same victim” and involved a “common scheme or plan.” U.S.S.G. § 3D1.2. As an initial matter, his argument is somewhat misplaced because the district court’s grouping analysis with respect to Count Four did not result in any grouping enhancement. That is because, as calculated by the district court, the adjusted offense level for Count Four was 17, which was more than nine levels below the adjusted offense level for the highest group – namely, the group consisting of Counts One and Three, which had an adjusted offense level of 34. *See* U.S.S.G. § 3D1.4(c) (“Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level.”).³ We also find that the district court did not err in declining to group Count Four with Counts One and Three. Counts One and Three arise out of the same common criminal scheme, i.e., to force illegal aliens to work without pay, and to engage in extortion if they failed to obey. The victims relating to these counts are the aliens themselves. By contrast, Count Four concerns the obtaining of false green cards so that the victims could work. Granted, that work was related to the overall scheme, as Ibanez contends. However, the victim of Count Four is the government, which is damaged by the use of false official documents, not the aliens, who are at most secondary victims. *See* U.S.S.G. § 3D1.2 cmt. n.2 (“The term ‘victim’ is not intended to include indirect or secondary victims.”); *see also id.* (explaining that society is the victim of crimes involving “possession of fraudulent evidence of citizenship”).⁴

² At oral argument, the government advised the Court that it continues to believe that the facts do not justify any role-in-offense enhancement, and that it will maintain that position on remand. We do not reach this issue because the district court did not make factual findings sufficient for review.

³ We note, however, that as grouped, it appears that the district court should have increased the total offense level from 31 to 32. That is because when it eliminated the vulnerable victim enhancement from Count One as to Ibanez only, such reduction brought the offense levels for Counts One and Two (which were not grouped) within 8 points. That should have resulted in a ½ unit grouping increase and corresponding one level grouping enhancement. *See* U.S.S.G. § 3D1.4(b).

⁴ For the same reason, it appears that Count Four should have been grouped with Count Two – in both, the victim is society at large. *See* U.S.S.G. § 3D1.2 cmt. n.2 (“Where one count . . . involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related.”). However,

In light of the discrepancies in the sentences imposed below, and the apparent confusion regarding the grouping analysis, vacatur of both defendants' sentences and remand for de novo sentencing is appropriate.⁵ However, we decline defendants' request that the case be reassigned on remand to a different judge. Reassignment is warranted only in the rarest of circumstances, *cf. United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (per curiam) (en banc), none of which are present here. The errors in Judge Feuerstein's analysis do not reflect any bias on her part, and her familiarity with the case renders the proposed reassignment judicially uneconomical.

For the reasons discussed, we VACATE the sentences of the district court and REMAND for de novo sentencing consistent with this decision.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
By:

neither party has raised this issue and we need not decide it.

⁵ In light of this remand, we need not and do not decide Zavala's alternative argument that the district court's legally erroneous enhancement effectively resulted in a non-Guidelines sentence of which she had no advance notice. *Cf. United States v. Anati*, 457 F.3d 233, 234 (2d Cir. 2006) (holding that a district court may not *sua sponte* impose a non-Guidelines sentence without first giving the adversely affected party notice and an opportunity to challenge the sentencing grounds).